

STATE OF MICHIGAN
COURT OF APPEALS

RODERICK L. DUNBAR,

Plaintiff-Appellant,

v

YORK INTERNATIONAL CORPORATION,

Defendant-Appellee.

UNPUBLISHED

August 22, 2006

No. 268963

Oakland Circuit Court

LC No. 2005-066342-CZ

Before: Saad, P.J., and Jansen and White, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree that dismissal of plaintiff's claims on the basis of federal preemption was error. However, I do not agree that plaintiff's claims are properly dismissed on alternate grounds, therefore I respectfully dissent.

Regarding plaintiff's contract claim, defendant's personnel policies are far less than clear on the issue of "employee" versus "applicant" status. In fact, the wording of defendant's Drug and Alcohol Policy's section entitled "Testing", is easily susceptible to an interpretation that plaintiff was an employee, not an applicant, because it provides that "applicants" must "pass a drug test *prior to beginning work*." The record is clear that plaintiff began work for defendant before taking a drug test.

Policy 2105.30 provides:

2105.30 Testing

YORK may test individuals to determine compliance with this policy as set forth below. Testing will comply with all applicable federal, state or local laws and regulations.

Applicants – *As a condition of initial employment* and as permitted by federal, state or local law, all applicants will be required to pass a drug test ***prior to beginning work***. An applicant who tests positive will not be considered for employment. Hair samples will be used for pre-employment screening, except in Connecticut, Maine, Montana, Nebraska and Ohio where urinalysis will be used.

Employees – Employees will be subject to drug/alcohol testing in any of the following circumstances as permitted by federal, state or local law. Urinalysis is the preferred testing method for employee testing, however, hair samples will be used if a urine sample cannot be collected. . . . [Emphasis added.]

In response to defendant's argument that plaintiff was on notice that he was a "conditional" employee, I observe that even assuming that plaintiff was a conditional employee does not answer the question whether a conditional employee has rights of an "applicant" who never began work for defendant, or has rights of an "employee," albeit conditional on passing a drug test.

Under defendant's Drug and Alcohol Policy, section 2105.50, entitled "Positive Tests," employees are entitled to have their sample retested.

A Medical Review Officer (MRO) who is a licensed physician ***will review all test results reported as confirmed positive by the laboratory.*** ***An individual*** who has a confirmed positive test result will have the opportunity to explain the positive test results, in confidence, to the MRO.

An employee who tests positive shall be informed in writing the identity of the drug(s) for which s/he tested positive ***and the right to have that same sample retested.*** ***The employee shall pay for the cost of such additional testing in advance via money order or cashiers' check.*** . . . [Emphasis added.]

Plaintiff's supervisor advised plaintiff that he had a right to a retest provided plaintiff paid for it, and gave plaintiff a copy of the above policy. Plaintiff tendered payment to defendant for the retest on October 6, 2004. It was not until five months later, in March 2005 that defendant wrote plaintiff and advised that plaintiff was not entitled to a retest. Given the wording of defendant's written policies; plaintiff's supervisor's apparent belief that plaintiff was an "employee," not an "applicant," and that plaintiff thus was entitled to a retest; and defendant's acceptance of plaintiff's tender of payment for a retest, I conclude that a genuine issue of fact existed whether plaintiff had a right to a retest under defendant's written policies.

Regarding plaintiff's discrimination claim, discovery remained open at the time defendant filed its motion for summary disposition and, as plaintiff argued in response to defendant's motion, defendant failed to provide an unqualified answer to plaintiff's interrogatory regarding other persons to whom defendant refused to allow retesting following a positive drug screen. Given these circumstances, I cannot agree with the majority that dismissal of plaintiff's discrimination claim is proper.

I would reverse the dismissal of both of plaintiff's claims.

/s/ Helene N. White